

Conversely, respondent requests the Board to affirm the preliminary hearing Order. The respondent argues claimant failed to prove that respondent could have reasonably estimated for the current 2001 calendar year a total gross annual payroll of more than \$20,000.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the arguments contained in the parties' briefs, the Board makes the following findings and conclusions:

Respondent is a sole proprietorship individually owned by Alexander Anurago. Mr. Anurago started this automobile repair business in July 2000. Claimant started working for respondent as a mechanic on November 22, 2000.

On January 10, 2001, claimant fractured his right little finger while working for the respondent. After the injury, Mr. Anurago took claimant to the hospital emergency room for treatment. The next day, claimant was seen by orthopaedic surgeon Mark Melhorn.

Claimant returned to work on January 12, 2001. But claimant testified he only worked part-time until he was fired by the respondent. Respondent, however, disputes that claimant was fired. Instead, respondent contends claimant walked off the job.

The preliminary hearing record is unclear as to claimant's last day worked. After claimant's January 10, 2001 injury, claimant testified he worked half days for about a week and then was fired on a Saturday. This would put his last day worked as Saturday, January 20, 2001.

Respondent admitted into the preliminary hearing record a wage statement showing that claimant was paid total wages of \$2,325 while he was employed by respondent. Claimant verified that \$2,325 was the total amount of pay he had received while employed by the respondent. Also, claimant testified he would normally receive \$500 to \$550 for work during a two week pay period. But respondent testified \$50 of the two week salary he paid claimant was a gift for claimant's girlfriend because she was pregnant.

After claimant left respondent's employment in January 2001, respondent employed Dave Welch to manage respondent's automotive repair service and to also perform work as an automobile mechanic. Mr. Welch started working for respondent on February 5, 2001. Respondent admitted into the preliminary hearing record a payroll statement showing that Mr. Welch for a five week period had earned \$1,595 for a \$319 per week average.

Claimant has the burden to prove coverage under the Workers Compensation Act with respect to the total gross annual payroll requirements set forth in K.S.A. 44-505(a)(2)¹ The pertinent provisions of K.S.A. 44-505(a)(2) provide:

¹ See Fetzer v. Boling, 19 Kan. App. 2d, 264, Syl. ¶3, 867 P.2d 1067 (1994)

[T]he workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:

(2) Any employment . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees, except that no wages paid to an employee who is a member of an employer's family by marriage or consanguinity shall be included as part of the total gross payroll of such employer for purposes of this subsection;

Here, claimant argues that respondent hired Mr Welch, an experienced mechanic, and it is reasonable to estimate, based on Mr. Welch's \$319 average weekly wage he has earned so far in 2001, that respondent will have a total gross average annual payroll in 2001, of more than \$20,000. Claimant asserts this conclusion is supported by Mr. Welch's present expected annual income of \$16,588, based on Mr. Welch's current \$319 average weekly wage. Plus, both Mr. Welch and Mr. Anurago testified their agreement was that Mr. Welch's pay would increase as the business increased. The claimant contends it is reasonable to expect an increase in business and such increase will cause Mr. Welch's yearly earnings to exceed the \$20,000 statutory threshold.

But on the date of the claimant's accident, January 10, 2001, respondent's only employee was claimant. Based on claimant's highest two week period of earnings of \$550 per week, the respondent's reasonable estimate of total gross annual payroll for current 2001 calendar year would have been only \$14,300. This earning total is clearly less than the statutory threshold of \$20,000. Therefore, the Board agrees with the ALJ and concludes the Workers Compensation Act does not apply to the parties.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that ALJ Nelsonna Potts Barnes' March 14, 2001, preliminary hearing Order, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 2001.

BOARD MEMBER

c: Chris A. Clements, Wichita, KS
Kelly W. Johnston, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director